Supreme Court, U. S.
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No. 80-163

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

IN RE

CHESTNUTT MANAGEMENT CORPORATION,

Petitioner,

—v.—

HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, Circuit Judges, and the HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

—and—

ELEANOR C. MILLER,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS AND BRIEF IN SUPPORT THEREOF

Dated: July 28, 1980

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Questions Presented for Review Upon Petition for Writ of Mandamus

When this Court

(a) necessarily decided that it had jurisdiction of this case, thereby deciding that the judgment below upon a general jury verdict did not rest upon any adequate non-federal ground, in the very grant of the writ of certiorari in No. 78-463, and

(b) exercised this Court's jurisdiction and power to vacate a judgment upon a general jury verdict of October 1975 for exactly $53,000 upon a non-existent federal claim under the Investment Advisers Act by this Court's order of November 26, 1979 reading (444 U.S. ——, 100 S.Ct. 443):

> "78-463 *Chestnutt Management Corp.* v. *Miller.* The motion of Investment Counsel Association of America, Inc. for leave to file a brief, as *amicus curiae* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. —— (1979)."

(1) Whether Respondent Judges Timbers, Van Graafeiland and Waterman proceeded outside and in excess of their jurisdiction to provide a retroactive cure for a general jury verdict in October 1975 upon a non-existent federal claim and to determine March 31, 1980 that their earlier judgment of April 3, 1978 upon the identical October 1975 general verdict for $53,000 "remains unaffected" by this Court's mandate, whereby said Respondents effectively

overruled and reversed this Court's necessary determination of and exercise of its jurisdiction in vacating the judgment of April 3, 1978, and whereby said Respondents necessarily held that the writ of certiorari was improvidently granted, since, as Respondents necessarily and expressly held, such general verdict could be sustained as resting upon an adequate nonfederal ground which they reiterated March 31, 1980.

(2) Whether said Respondents compounded their defeat of this Court's appellate jurisdiction by their disregard of an unbroken line of decisions as to general verdicts, as, for example, expressed in *Sunkist Growers, Inc.* v. *Winckler & Smith, etc.*, 370 U.S. 19 (1962) at 29-30:

> "Since we hold erroneous one theory of liability upon which the general verdict may have rested—a conspiracy among petitioners and Exchange Lemon—it is unnecessary for us to explore the legality of the other theories. As was stated . . . in *Maryland* v. *Baldwin*, 112 U.S. 490, 493, 5 S.Ct. 278, 28 L.Ed. 822 (1884), '[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld . . .'"

and never questioned in this Court as the supreme law of the land as to jury verdicts under the Seventh Amendment to the Constitution of the United States.

(3) Whether this Court should treat this petition as one for certiorari (*Collier* v. *United States*, 382 U.S. 890 (1965)) and now consider the award of punitive damage for publication of opinion as already granted in our petition filed September 18, 1978. See *Hughes Tool Co.* v. *TWA*, 409 U.S. 363, 364, Note 1 (1973); *New York Times*

Co. v. *Sullivan*, 376 U.S. 254 (1964); *Virginia State Board of Pharmacy* v. *Virginia City Consumers Council, Inc.*, 425 U.S. 748 (1976); *Carey* v. *Population Service International*, 431 U.S. 678 (1977); *First National Bank, etc.* v. *Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison, etc.* v. *Public Service Commission, etc.*, —— U.S. ——; and *Central Hudson Electric & Gas Co.* v. *Public Service Commission, etc.*, —— U.S. ——, both decided June 20, 1980.*

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* Petitioner's Supplemental Brief in Support of Petition for Certiorari dated October 15, 1979 commenced (pp. 1-2):

"Probable jurisdiction noted October 1, 1979 in *Consolidated Edison, etc.* v. *Public Service Commission of New York* (No. 79-134) is even more important than decisions* on 'implication' and 'securities laws.'

* * *

Con Edison, supra, is classic prior restraint.

This *Chestnutt* case is classic punishment for opinion published to the world. It was pleaded, tried, charged to the jury and affirmed on appeal as unorthodox opinion.

* * *

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* We include reference to:

Touche Ross & Co. v. *Redington, Trustee, et al.* (No. 78-309) —— U.S. ——, 99 S.Ct. 2479 (1979).

Burks v. *Lasker* (No. 77-1724) —— U.S. ——, 99 S.Ct. 1831 (1979).

Cannon v. *Univ. of Chicago* (No. 77-926) —— U.S. ——, 99 S.Ct. 1946 (1979).

Teamsters v. *Daniel* (No. 77-753) —— U.S. ——, 99 S.Ct. 790 (1979)."

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HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, Circuit Judges, and the HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

—and—

ELEANOR C. MILLER,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

The petitioner moves this Court for leave to file the petition for a writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing the Honorable William H. Timbers, Honorable Ellsworth A. Van Graafeiland, Honorable Sterry R. Waterman, Circuit Judges, and the Honorable United States Court of Appeals for the Second Circuit, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why

your petitioner should not have such other and further relief in the premises as may be just and meet.

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Decisions Below

This Court's order of November 26, 1979 vacated a judgment reported at 578 F.2d 1386, reflecting an unreported oral decision from the bench printed A23-A25 to Petition in No. 78-463 affirming judgment on a general jury verdict.

The Memorandum Decision and Order on remand from this Court is unreported and is printed herewith as mandamus appendix pp. 1a-3a hereto.

Supreme Court Order and Judgment of November 26, 1979

"78-463 *Chestnutt Management Corp.* v. *Miller.* The motion of Investment Counsel Association of America, Inc. for leave to file a brief, as *amicus curiae* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. —— (1979)."

Jurisdictional Statement

The Order on Remand from the Supreme Court was made and entered March 31, 1980 (Mand.Ap., pp. 1a-3a hereto). A timely petition for rehearing with *en banc* suggestion was denied May 28, 1980 (Mand.Ap., pp. 4a-5a hereto).

Jurisdiction is conferred by 28 U.S.C. §1651(a). In the event this petition for mandamus is treated as a petition for certiorari jurisdiction is conferred by 28 U.S.C. §1254(1).

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CHESTNUTT MANAGEMENT CORPORATION,

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HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, Circuit Judges, and the HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

—and—

ELEANOR C. MILLER,

Respondent.

PETITION FOR A WRIT OF MANDAMUS

(1) On November 26, 1979 this Court made its order in this case (No. 78-463, *Chestnutt Management Corp.* v. *Miller*) quoted in our "Questions Presented for Review" whereby this Court vacated the judgment below and ordered reconsideration in light of a decision holding that there was no federal cause of action for money damage under the Investment Advisers Act (15 U.S.C. 80b, *et seq.*). Respondent Judges upon cross motions of the parties by order dated February 8, 1980 directed filing of supplemental

briefs and on March 31, 1980 affirmed the judgment of the District Court (mandamus appendix hereto pp. 1a-3a). Petitioner's timely petition for rehearing with *en banc* suggestion was denied May 28, 1980 (mandamus appendix hereto pp. 4a-5a).

(2) The petition for certiorari No. 78-463 was filed September 18, 1978 and petitioner thereafter filed a reply brief in support of petition dated November 2, 1978, and in light of intervening decisions of this Court and reargument had in *Transamerica Mortgage Advisors Inc.* v. *Lewis*, petitioner filed a supplemental brief dated October 15, 1979 containing a supplemental appendix of the pleadings (A31 through A42). The appendix to the petition for certiorari (and bound therewith) contained the following:

APPENDIX

1. Ex. 4—Profiting from Stock Market Psychology A1
2. Petitioner's Proposed Charges A8
3. District Judge's Charges A11
4. District Court Denial of Motion n.o.v., etc. A18
5. Court of Appeals Judgment A19
6. Denial of Rehearing A21
7. Panel Decision Dictated from Bench A23
8. Statutory Appendix A26

(3) The petition for certiorari argued and presented the question (pp. 2-3) whether petitioner's First Amendment rights had been violated by punishment for publishing financial opinion (also fairly including violation of due process rights for "vagueness" in failure to allege purported fraud with the "particularity" required by Rule

9(b) F.R.Civ.Pr.). A second question presented was whether the Investment Advisers Act permitted this first money judgment in four decades.

(4) Respondent Miller's brief in opposition to the petition for certiorari sought to defeat this Court's jurisdiction to review the judgment upon a lump sum general verdict as resting upon an adequate nonfederal ground (Br. in Op., pp. 10-13) under a Jurisdictional Rubric:

> "A. THERE WAS AMPLE EVIDENCE OF COMMON LAW FRAUD AND VIOLATIONS OF THE INVESTMENT ADVISERS ACT."

(5) Petitioner's reply brief dated November 2, 1978 argued (pp. 6-8) under contrary Jurisdictional Rubric:

"I. RESPONDENT CANNOT CARVE OUT ANY STATE GROUND."

(6) This Court's November 26, 1979 order in this case by the exercise of jurisdiction necessarily determined that this Court had jurisdiction and that there was no adequate nonfederal ground to support the general verdict and this Court's single instruction was to reconsider in light of dismissal of a nonexistent purported federal claim for money damage.

(7) The April 3, 1978 oral decision by Respondent Judge Timbers (pet. for cert. app. A23-A25) directly and expressly upheld the general verdict under the Investment Advisers Act and a Rule thereunder, as follows (A24):

> "We hold that plaintiff presented sufficient evidence from which the jury could have found that Rule 206(4)-1(a)(3) was violated . . ."

(8) This Court's exercise of jurisdiction to vacate the judgment necessarily determined that the same general

verdict could not be sustained on any adequate nonfederal ground, as had been upheld by Respondent Judge Timbers' next sentence (Pet. appendix A-24):

> "Moreover, Chestnutt's intentional failure to disclose its prior performance in bear markets we hold constituted a sufficiently material non-disclosure to support a jury finding of common law fraud."

(9) Petitioner's "Supplemental Brief, etc. . . ." on remand from the Supreme Court physically annexed and incorporated the petition for certiorari granted by this Court in No. 78-463 as well as petitioner's Reply Brief (dated November 2, 1978) and Supplemental Brief submitted to this Court (dated October 15, 1979), both in support of certiorari.

(10) On March 31, 1980 Respondent Judges on remand decided that their April 3, 1978 judgment "remains unaffected" and overruled this Court's jurisdictional determination, and Respondents can be corrected only by the issuance by this Court of its writ of mandamus to Respondents to prevent the defeat of this Court's appellate jurisdiction.

Wherefore, petitioner prays that a writ of mandamus issue from this Court directed to the Honorable Respondents and the United States Court of Appeals for the Second Circuit requiring said Respondents to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable William H. Timbers, Honorable Ellsworth A. Van Graafeiland, Honorable Sterry R. Waterman and the Honorable United States Court of Appeals for the Second Circuit to show cause on a day to be fixed by this Court why mandamus

should not issue from this Court directing said Honorable Judges thereof and the United States Court of Appeals for the Second Circuit to vacate and expunge from the record the order of March 31, 1980 directing affirmance upon the 1975 general jury verdict and directing entry of an order by said Honorable Respondents ordering dismissal of the complaint and that petitioner have such additional relief as may be necessary and appropriate in the circumstances.

Respectfully submitted,

.....

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BRIEF IN SUPPORT OF AND REASONS FOR GRANTING THE WRIT OF MANDAMUS

Petitioner "prevailed in this Court" and "its remedy is by motion for leave to file a writ of mandamus . . ." *Vendo Company* v. *Lectro-Vend Corporation, et al.*, 434 U.S. 425, 427-428 (1978). *General Atomic Company* v. *Feltner*, 436 U.S. 493 (1978).

A recent instruction of this Court, *O'Connor* v. *Donaldson*, 422 U.S. 563, at 579, Note 12 (1975) reads:

> ". . . Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case. See *United States* v. *Munsingwear*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36".

Respondent Judges have "deprive[d]" this Court's judgment of "precedential effect" and substituted their prior judgment as the "sole law of the case".

In *United States* v. *Munsingwear*, 340 U.S. 36 (1950) Mr. Justice Douglas stated (340 U.S. at 38):

> "We start then with a case which falls squarely within the classic statement of the rule of *res judicata* in *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355:
>
> > 'The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the

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> second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.'"

For a purported nonfederal ground to survive this Court's judgment, *sub silentio,* means that this Court had no jurisdiction to do what it did. That is precisely what Respondent Judges held in defeating this Court's appellate jurisdiction by declaring the five-year old *general* jury verdict to have survived this Court's exercise of judicial power.

Just as Congress knows how to create a federal cause of action when it intends to do so, likewise this Court knows how expressly to order a new trial in an eight-year old case of a possible nonfederal claim when the Court intends to do so.

We have not found elsewhere a holding on remand that this Court exceeded its jurisdiction *sub silentio.*

The more strenuously Respondent Miller opposed granting the writ on purported common law ground, the more surely she established as *res judicata* the inadequacy of any state ground.

Respondent Judges held in effect that this Court simultaneously granted the writ and dismissed the writ as improvidently granted. See *Hughes Tool Co.* v. *TWA,* 409 U.S. 363, 365, Note 1 (1973).

Where this Court exercised its jurisdiction on the merits, "This Court then necessarily decided (1) that it had jurisdiction . . ." (*United States* v. *United States District Court, United States* v. *Haley,* 371 U.S. 18 (1962)) in a

prior appeal (358 U.S. 644), and accordingly granted the writ of mandamus.

Since this Court's very jurisdiction depended upon there being no adequate state ground to support the general verdict of the jury, charged upon a nonexistent federal claim, Respondent Judges ". . . strike[.] at the heart of [this Court's] mandate . . .". *Utah Public Service Comm.* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 468 (1969).

The ALPHA of this case (pet., p. 4) was:

> "This case indicted a book published in 1952 (17th Ed., copyright 1969 with factual tabulations through 1968, in evidence to the jury in 1975 as Ex. 5) and punished the author. Not only its quarter-century old cartoons, but also a ten-column copyrighted magazine article written in *Medical Economics* (Ex. 4) by its Senior Editor, constituted federal securities "fraud", as did some 75 weekly letters of opinion published worldwide (Ex. 3)."

The OMEGA of this case (Supplemental Br. dated October 15, 1979, p. 9) was:

> "Respondent elected the federal court, assuming an impenetrable dark rain forest of 'securities laws' and 'implication'. The searchlights of recent decisions of this Court blazingly illuminate that her suit is amorphous in all respects, except that the clear shape of the First Amendment was targeted to the jury which hit its exercise with punitive damage."

We do not read this Court's decisions as receding from "free speech", commercial or otherwise. *Consolidated Edison, etc.* v. *Public Service Comm., etc.*, 48 L.W. 4776; *Central Hudson Gas & Electric* v. *Public Service Comm., etc.*,

48 L.W. 4783; *Richmond Newspapers, Inc.* v. *Commonwealth of Virginia,* 48 L.W. 5008. As to punitive damage for expression of financial opinion, we quote Justice Stevens, concurring in *Central Hudson* (48 L.W. at 4789):

> "Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience."

In *Richmond Newspapers,* we note the Chief Justice's quotation (48 L.W. at 5013):

> "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 783 (1978)."

If, instead of the *general* verdict herein, there had been a *special* verdict under the Advisers Act and a *special* verdict under purported common law, this Court could well have elected to dispose of the case expressly under the First Amendment, passing over entirely this lawsuit's utter insufficiency, even as a pleading under Rule 9(b), F.R.Civ.Pr. See Justice Brandeis, concurring, *Ashwander* v. *TVA,* 297 U.S. 298, 341 (1936).

As stated in our Supplemental Brief dated October 15, 1979 (p. 3):

> "The pleadings* [A 31-A 42] show that respondent could not redraft her complaint to circumvent the

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* As pointed out in our Petition (p. 14), the charge to the jury in October 1975 preceded by several months this Court's decision in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976).

First Amendment, since publication of opinion is the gist and essence.

"In short, this suit never was, and never can be, either federal fish or state fowl."

* * *

This advisory agreement, terminable and in fact terminat*ed* at will and not requiring "rescission" (the sole remedy under *Transamerica, supra*), was entered into February 16, 1969. Six months later *Forbes Magazine* (August 15, 1969 Issue, at page 69) conferred on a different client of petitioner, American Investors Fund, Inc., a "D" grade, even though that mutual fund for an eight-year period (including four "up" markets and four "down" markets as defined by *Forbes*) was listed by *Forbes* itself as second *best* of 183 mutual stock funds for the entire period, which *Forbes's* own proprietary index moved up from $100 to $408 in the eight years, while moving up Standard & Poor's 500 Average from $100 to $178. (*Forbes*, August 15, 1969, pp. 50-51, 61-64, 69-71).

Respondent Miller's argument against this Court's *jurisdiction* was that such *post-hoc* third-party calumny (or misprint?)—that petitioner ". . . had received the lowest rating given by *Forbes* magazine", standing alone, was a "non-disclosure sufficient in itself to support a jury finding of common law fraud." (Brief in opposition to Petition for Certiorari, pp. 10-13).

This Court's grant of the writ and summary vacation of judgment necessarily adjudicated that third-party calumny of a different advisory client could not be hybridized with fraud by hindsight as a common law "sport" to defeat this Court's exercise of jurisdiction.

In the light of the *general* jury verdict on a nonexistent federal statutory claim, this Court did not see fit to remand

to consider whether it was "harmless error" to send a book to the jury to determine its orthodoxy. This Court did not remand to consider whether it was "harmless error" to conduct ". . . a Scopes Trial of stock market opinion resulting in automatic punitive damage, as well as the Sedition Law of financial writing." (Pet. Reply Brief, p. 2).

Respondent Judges' "Order on Remand From Supreme Court" Demonstrates Complete Misapprehension of This Court's Mandate

Since a large proportion of "securities" litigation is concentrated in this Circuit, it is all the more important that mandates of this Court be correctly apprehended, whatever the fervor with which any Judges have pursued contrary thought patterns as to the role of Congress under Article I of the Constitution and Separation of Powers.

Neither litigants nor lower courts should purport to school "one Supreme Court" to require a detailed opinion before the drift can be perceived of vacating a judgment in its entirety.

Nor is it for litigants or inferior courts to school this Court as to any separate or partial ground upon which this Court might have acted, or to presume a "vacated" judgment "remains unaffected" unless this Court expressly negates each item on a laundry list of legal possibilities.

Respondent Miller did not ask rehearing here, seeking to bring herself and this general verdict within *New York and New Jersey Sandy Hook Pilot's Ass'n* v. *Halecki,* 358 U.S. 613, 618 (1959) to obtain a new trial, where:

> "As to the claim based upon negligence, for which the New Jersey Wrongful Death Act clearly gives a right of action, we agree with the Court of Appeals that

> 'the evidence created an issue that could be decided only by a verdict' ".

Rather, on the basis of a trial that punished for exercise of free speech opinion as to financial matters, she pursuaded Respondent Judges to exceed their jurisdiction, and compound error in disregard of the holding in *Halecki, supra,* that the general verdict could not stand, since (358 U.S. at 619) there was:

> ". . . no way to know that the invalid claim of unseaworthiness was not the *sole* basis for the verdict." (Emphasis added)

Where in connection with federal lands the Fifth Circuit had applied federal law, the Court mandated in *Wallis* v. *Pan American Petroleum Corporation,* 384 U.S. 63, 72 (1966):

> "Having concluded that federal law should not govern the present controversy, we vacate the judgment of the Court of Appeals and remand the case to that court so that it may consider any other contentions respondents may have urged, including their claim that they should prevail under Louisiana law."

Failure by the Court of Appeals in *Wallis, supra,* to determine state law, as in *Burks* v. *Lasker,* 441 U.S. 471, 99 S.Ct. 1831 (1979), led to the explicit direction to consider *state* law. By contrast, the mandate herein was to consider dismissal of a federal statutory claim for money damage.

Neither Respondent Miller nor Respondent Judges have found authority for survival *sub silentio* of a nonfederal ground following exercise by this Court of power to decide a federal claim.

Instead, Respondents stand *Erie** on its head on the ground that the April 3, 1978 affirmance by that panel on express ground of "sufficient evidence" for money damage under the Advisers Act was no evidence at all, and petitioner could not have been aggrieved by such harmless error.

The "harmless error" rule does not overrule this Court's jurisdiction.

Nor does any asserted state practice control presentation of purported federal claims in federal courts.

The very cases cited by Respondent Judges require grant of the writ of mandamus.

Stephenson v. *Grand Trunk RR* (7 Cir., 1940) 110 F.2d 401, *cert. dismissed* 311 U.S. 720, relied on by Respondents did not involve *any federal claim.* The court held that an Illinois statute could not prevent a federal court sitting in that State from trying a negligence case arising out of a Michigan accident. The court further held, in the total absence of any federal claim, that an Illinois statute adopting the "two issue" rule should be followed as to that purely common law negligence case to the jury.

Respondent Judges' invocation of *Volasco Products Co.* v. *Lloyd A. Fry* (6 Cir., 1963), 308 F.2d 383, *cert. den.* 372 U.S. 907 (1963) is equally perplexing, since it demonstrates that both *pre-Erie* and *post-Erie,* error as to a federal claim required reversal of a jury verdict. The court held (308 F.2d at 390):

> "The plaintiff Volasco claims that the 'two issue' rule is applicable in Tennessee and that, if other issues were properly submitted to the jury, there can be no reversal because of an error in the submission of one

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* Erie RR. v. Tompkins, 304 U.S. 64 (1938).

issue. The plaintiff cites two cases from the Sixth Circuit, in support of this theory. *Louisville & Nashville Railroad Company* v. *Rochelle,* 252 F.2d 730, C.A. 6, and *Atlantic Coastline Railroad Company* v. *Smith,* 264 F.2d 428, C.A.6. These cases are both diversity cases tried in Tennessee where the two-issue rule prevails (*Tennessee Central Ry. Co.* v. *Umenstetter,* 155 Tenn. 235, 291 S.W. 452) and under *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, the District Court must follow the substantive law of the state. Tennessee and Ohio are the only states in the Sixth Circuit to follow this rule. This case is tried under federal law where the 'two-issue' rule is not applicable. *Wilmington Star Mining Co.* v. *Fulton,* 205 U.S. 60, 78, 79, 27 S.Ct. 412, 51 L.Ed. 708; *Baltimore and O.R. Co.* v. *Reeves,* 10 F.2d 329, 330, C.A.6; *Chicago and N.W. Ry. Co.* v. *Garwood,* 167 F.2d 848, 857, C.A.8; *Roth* v. *Swanson,* 145 F.2d 262, 269, C.A.8; *Atlantic Coast Line R. Co.* v. *Tiller,* 142 F.2d 718, C.A.4."

Respondent Judges further mistook fundamental principles as to federal questions in federal courts by failing to apprehend that properly charged *special* verdicts on separate state grounds might preserve them from the required new trial as to an erroneous *general* verdict on two federal grounds. *Morrissey* v. *National Maritime Union of America* (2 Cir., 1976), 544 F.2d 19, 26-27.

The Supreme Court acted upon this case in its entirety. The grant of certiorari was not limited.*

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* Our first "Question Presented" (pet. for cert., pp. 2-3) included:

"—and—

—Where, no security or transaction was alleged, or even identified to involve fraud under federal *or state law*;" (Emphasis added)

This Court vacated the judgment upon a general verdict by order written in plain text not permitting subsequent cryptanalysis below to divine that this Court never had jurisdiction to do what in fact this Court had done.

CONCLUSION

The petition for writ of mandamus should be granted in accordance with its terms.

Respectfully submitted,

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New York, New York 10017
(212) 940-8345

Dated: July 28, 1980

APPENDIX TO
PETITION FOR MANDAMUS

Order on Remand from Supreme Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. No. 77-7530

ELEANOR C. MILLER,

Plaintiff-Appellee,

v.

CHESTNUTT MANAGEMENT CORPORATION and CHESTNUTT CORPORATION,

Defendants,

CHESTNUTT MANAGEMENT CORPORATION,

Defendant-Appellant.

The Supreme Court on November 26, 1979, *Chestnutt Management Corp.* v. *Miller,* No. 78-463, 48 U.S.L.W. 3355 (U.S. Nov. 27, 1979), having vacated the judgment of our Court entered April 3, 1978, 578 F.2d 1368, and having remanded the case to our Court for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* —— U.S. —— (1979), 48 U.S.L.W. 4001 (U.S. Nov. 13, 1979); and

Our Court having invited the parties to file supplemental briefs to enable us to reconsider the case in light of the Supreme Court's mandate, said supplemental briefs having been filed and having been duly considered by us; it is therefore

ORDERED, ADJUDGED and DECREED that the judgment of the district court be, and the same hereby is, *affirmed,* for the reasons which follow.

Order on Remand from Supreme Court

This Court originally affirmed the judgment of the district court, holding that the evidence at trial was sufficient to support the jury verdict for appellee on both her claim based on common law fraud and her claim based on a violation of the Investment Advisers Act of 1940, 15 U.S.C. §80b-6 (1976). In light of the Supreme Court's decision in *Transamerica Mortgage Advisors, supra,* we hold that appellee's claim under the Investment Advisers Act no longer is viable and, to the extent the judgment was based on that claim, the judgment stands vacated. Our decision of April 3, 1978, however, expressly held that the common law fraud claim was properly submitted to the jury and was fully supported by the evidence at trial. This part of our judgment remains unaffected by the Supreme Court's order.

Appellant contends that since the jury returned a general verdict in this action, we cannot affirm the judgment of the district court as properly founded on the common law fraud claim. We disagree. Under the law of Connecticut, applicable to the common law fraud claim,

> "it has ever been considered to be the rule that where a complaint is divided into counts and a general verdict is rendered, if any of the counts are good, it will be presumed that the damages were assessed as to that count and the verdict will be sustained."

Ziman v. *Whitley,* 110 Conn. 108, 112 (1929); *accord, Filisko* v. *Bridgeport Hydraulic Co.,* 176 Conn. 33 (1978).

Since the Supreme Court has "stripped this case of its federal aspects", Brief for Appellant at 2, leaving only the state common law fraud claim (which is still supported by diversity jurisdiction), we hold that the substantive

law of Connecticut should govern the validity of the jury verdict upholding that claim. *Adkins* v. *Ford Motor Co.*, 446 F.2d 1105, 1108 (6 Cir. 1971); *Stephenson* v. *Grand Trunk Western R.R.*, 110 F.2d 401, 406-07 (7 Cir.), *appeal dismissed*, 311 U.S. 720 (1940). *Morrissey* v. *Nat'l Maritime Union of America*, 544 F.2d 19, 26-27 (2 Cir. 1976), is not to the contrary. Our Court there did not address the question now before us, namely, whether a *state* rule concerning general verdicts governs the validity of a jury verdict supported by a *state* common law claim. The *Morrissey* Court simply established the rule applicable to federal claims. *Accord, Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 390 (6 Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

In summary, since the common law fraud claim was submitted properly to the jury, and the evidence at trial clearly was sufficient to support the jury verdict for appellee on that claim, we affirm the judgment of the district court.

/s/ STERRY R. WATERMAN
Sterry R. Waterman

/s/ WILLIAM H. TIMBERS
William H. Timbers

/s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland
Circuit Judges.

Dated at New York, N.Y.
this 1st day of
March, 1980.

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. No. 77-7530

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of May, one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. STERRY R. WATERMAN

Circuit Judges.

ELEANOR C. MILLER,

Plaintiff-Appellee,

v.

CHESTNUTT MANAGEMENT CORPORATION and CHESTNUTT CORPORATION,

Defendants,

CHESTNUTT MANAGEMENT CORPORATION,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant Chestnutt Management Corp.,

Denial of Petition for Rehearing

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. Daniel Fusaro,
Clerk

Denial of *En Banc* Suggestion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. No. 77-7530

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of May, one thousand nine hundred and eighty.

ELEANOR C. MILLER,

Plaintiff-Appellee,

v.

CHESTNUTT MANAGEMENT CORPORATION and CHESTNUTT CORPORATION,

Defendants,

CHESTNUTT MANAGEMENT CORPORATION,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant Chestnutt Management Corp., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Denial of En Banc Suggestion

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge